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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.40000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF BELL ATLANTIC ON NOTICE OF INQUIRY[1]

I. Introduction and Summary

The comments address two groups of distinct issues relating to local regulation of telecommunications services, (1) the proliferation of regulatory measures directed at the telecommunications industry by counties and municipalities, which would impose a third and

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

fourth tier of regulation on the industry,[2] and (2) the proliferation and stacking of excessive multiple financial burdens on telecommunications service providers and the potential effect of certain tax policies. *See* NOI at ¶¶ 78-84.

In response to the first issue, the Commission should reiterate its earlier findings regarding the permitted scope of local regulatory measures and state that it will entertain petitions for preemption of measures that interfere with competitive entry, as permitted under 47 U.S.C. § 253(d). The second issue, local franchising and taxing authority, generally transcends the permitted bases for preemption under section 253(d), and is not subject to Commission review.

II. Local Telecommunications Regulation Should Be Limited To Management of Public Rights of Way.

Cities and counties have a legitimate role in managing public rights of way consistent with the public interest. For example, cities may impose reasonable restrictions on the length of time that a carrier may restrict access to public thoroughfares in order to lay cable, and they may enact reasonable requirements for restoration of roadway surfaces. But, as the Commission has made clear, counties and municipalities may not, in the name of right-of-way management, impose a separate tier of pervasive regulation of the type lawfully exercised by state utility commissions for intrastate services and by this Commission for interstate services,[3] and the

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[2] *See Notice of Proposed Rulemaking and Notice Of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673, ¶ 76 (1999) ("NOI").

[3] *See TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, ¶¶ 102-106 (1997) ("TCI Cablevision"); *Classic Telephone, Inc.*, 11 FCC Rcd 13082, ¶ 39 (1996) ("Classic Telephone").

Commission should declare that it will exercise its authority to preempt any requirements that interfere with its pro-competitive telecommunications policies. *See* 47 U.S.C. § 253(d).

With some 3,142 counties and, within them, some 1,078 cities of 25,000 or more inhabitants and 11,097 municipalities of 2,500 or more inhabitants,[4] telecommunications companies face the potential of intrusive third and fourth tier regulation of their operations. If these jurisdictions merely imposed traditional and reasonable right of way management regulations applicable to all utilities using their rights of way, there would be no unreasonable burden on the telecommunications industry. However, experience since enactment of the 1996 Act has demonstrated that many county and municipal governments are seeking to impose a far broader regulatory scheme than is reasonably necessary for right of way management. Not surprisingly, in view of their membership in national and regional associations, the provisions of the so-called franchising ordinances of many of the counties and municipalities are markedly similar.[5] They often deny telecommunications service providers the right to place or maintain their facilities in the affected rights of way unless they meet operational and service standards which are totally discretionary with each individual county or municipal government. Each provides for ongoing oversight of telecommunications services by the county or municipal governments with the potential for revocation of the right to provide service or to transit the locality if service standards do not meet the discretionary approval of the local government.

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[4] United States Census Bureau, County and City Data Book, 1994 (Revised June 21, 1999); United States Census Bureau, USA Counties 1998 (Revised Nov. 15, 1999).

[5] Compare, *e.g.*, ordinances considered in *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F.Supp.2d 582 (N.D. Texas 1998); *TCG Detroit v. City of Dearborn*, 16 F.Supp. 2d 785 (E.D. Mich. 1998) ("TCG"); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F.Supp. 928 (W.D. Texas 1997); *Bell Atlantic - Maryland v. Prince George's County*, 49 F.Supp. 2d 805 (1999).

Just within Bell Atlantic's footprint, the potential exists for redundant regulation by nearly 1000 separate jurisdictions – both counties and the municipalities within those counties – possibly applying as many different discretionary standards. This cannot be what Congress intended when it sought to deregulate telecommunications by enacting the 1996 Act.

A typical example of the type of pervasive regulation imposed in the name of right of way management was enacted in Prince Georges County, Maryland. That ordinance was set aside by the United States District Court and is now pending on appeal. *Bell Atlantic - Maryland v. Prince George's County*, No. 99-1784 (4th Cir.). The Prince Georges County ordinance would forbid any entity from installing or maintaining facilities in rights of way within Prince George's County unless the county first gives its approval. In order to attempt to secure such approval, the entity would be required to submit an application setting forth the technical standards it proposes to follow in the operation of its telecommunications system, a description of the telecommunications services it intends to provide, financial information of an undefined scope (and therefore subject to unbounded staff discretion), a list of the other jurisdictions in which it operates or has operated a telecommunications system, and "any additional information the County's application form may require." Once the application has been submitted, the application would be subject to a public hearing. As a result of the application and hearing, the County would have total discretion to consider, *inter alia*, the applicant's managerial, technical, financial and legal qualifications to construct and operate a telecommunications system on county property; the nature of the proposed facilities, equipment and services; the applicant's "performance record" in other communities; the public interest; and "such other factors as the County may deem relevant" in recommending whether or not to allow the entity to operate in the County.

If the county recommends that the entity receive a franchise, the County Executive is to negotiate a franchise agreement, the contents of which are entirely open-ended, and that agreement is then subject to approval or disapproval by the County Council. If the entity is unable to reach agreement with the County Executive on franchise terms within a specified period, the entire process begins anew, and the entity may not provide telecommunications service in the county. Moreover, even if a franchise is awarded, the transfer of any interest in the provider requires county approval, with no standard for such approval specified in the ordinance.

These requirements share a common thread with those enacted in a number of other municipalities, including the cities of Dallas and Austin, Texas; Troy, Michigan; Coral Springs, Florida; Dearborn, Michigan; and Bogue and Hill City, Kansas. That common thread is that the affected local governments all seek to control the terms and conditions under which telecommunications services are offered to the public and have virtually unlimited discretion to undermine federal pro-competitive policies – all in the name of right of way management. As the Commission stated in TCI Cablevision (at ¶¶ 105-06) in connection with the Troy, Michigan ordinance,

> Such Ordinance provisions will be difficult to justify under section 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority or other traditional municipal concerns such as police, fire, building code enforcement or other public safety concerns. In addition, several of these provisions seem redundant of comprehensive federal and state regulatory programs governing intercarrier interconnection and universal service obligations and support.
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> [S]ection 253(b)'s reservation to the States of authority over issues such as universal service, safety, and consumer protection appears to reflect Congress' view that an array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition. As a result, where relations among telecommunications providers would be affected, or where the rates, terms, and

> conditions under which telecommunications service is offered to the public are dictated by an local ordinance, is of considerable concern to this Commission.

The Commission should not tolerate this type of regulation. Instead, it should reiterate the limits of permissible right of way management regulation, as initially set forth in Classic Telephone (at ¶ 39, quoting 141 Cong. Rec. S8172 (June 12, 1995)):

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."[6]

Based upon these principles, the Commission should, pursuant to section 253(d), preempt the enforcement of "right of way" ordinances that exceed these limits and thereby violate section 253(a) by "hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

III. Franchise and Tax Issues Are Beyond the Commission's Preemption Authority Under the Act.

Incumbent local exchange carriers in several states and cities were long ago granted perpetual franchises as inducements to make the enormous capital investments necessary to bring telecommunications into those states. As pointed out in the comments of Michigan Communities (at 5-6), "Michigan law... prohibits the City of Troy from revisiting the authority of Ameritech to operate in the public rights-of-way and, consequently, negotiating from Ameritech a franchise fee equal to that being paid [by others] under the City's Telecommunications Ordinance," citing

[6] Any such right of way management, of course, must be undertaken in a manner consistent with applicable requirements of state law, including providing for recovery of costs.

TCG. In TCG, the Federal District Court held that the franchise granted to Ameritech by the State of Michigan at the time of its entry into Michigan "constitute[s] a contract between the state and defendant beyond the power of the Legislature, the Constitution [of Michigan], or of [the] Court to impair by destroying the contract right to remain in the streets." TCG at 795.

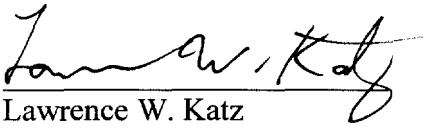
Similar perpetual franchises were granted to a number of Bell Atlantic's local operating companies in municipalities and counties throughout its operating territory. As is the case with the Troy franchise, these franchises constitute binding contracts that are beyond the reach of regulatory authorities.

Even if the Commission had any authority over these agreements, which it does not, its preemption authority is limited by section 253(d) to ordinances that violate 253(a) or (b). The 1996 Act, as originally reported out of committee, had provided for preemption of ordinances in violation of not only subsections (a) and (b), but also subsection (c), which allows states and localities to adopt non-discriminatory right of way regulations and fees. Floor amendments would have stripped away all Commission preemption authority under section 253. As a compromise, Congress eliminated the Commission's preemption authority as to subsection (c) only, retaining it for subsections (a) and (b).[7] Section 253(a) prohibits states or localities from enacting provisions that prohibit any entity from providing any telecommunications service, while 253(b) preserves state authority to impose requirements necessary to protect or advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Accordingly, legislative

[7] *See, e.g.*, 142 Cong. Rec. S-687-01 at S-716 (statements of Senator Feinstein); 141 Cong. Rec. S-8206-02 at S-8212, 13 (statements of Senator Gorton amending Feinstein-Kempthorne amendment).

history confirms that the Commission has no preemptive authority over right of way regulations or fees that discriminate among providers.

Respectfully submitted,



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